

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-195 ✓

In the Matter of

Amendment of Section 73.202(b).	RM-7091
Table of Allotments.	RM-7146
FM Broadcast Stations.	RM-8123
(Beverly Hills, Chiefland, Holiday, Micanopy, and Sarasota, Florida)	RM-8124

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: November 8, 1993; Released: December 8, 1993

By the Chief, Policy and Rules Division:

1. The Commission has before it the Petition for Reconsideration filed by Dickerson Broadcasting, Inc. ("Dickerson"), licensee of Station WEAG-FM, Channel 292A, Starke, Florida, directed to the *Report and Order* in this proceeding, 8 FCC Rcd 2197 (1993). Sarasota-FM, Inc., Gator Broadcasting Corporation, and Heart of Citrus, Inc. filed a joint Opposition to Petition for Reconsideration. Pasco Pinellas Broadcasting Company filed an Opposition to Petition for Reconsideration. Dickerson filed a Joint Reply to Opposition to Petition for Reconsideration. For the reasons discussed below, we deny the Petition for Reconsideration.

BACKGROUND

2. In response to a Petition for Rule Making filed September 29, 1989, Heart of Citrus, Inc. ("Heart of Citrus"), permittee of Station WXOF (formerly WPDS), Channel 246A, Beverly Hills, Florida, the *Notice of Proposed Rule*

Making, 7 FCC Rcd 5910 (1992), in this proceeding proposed the substitution of Channel 246C3 for Channel 246A at Beverly Hills, and modification of the Station WXOF construction permit to specify operation on Channel 246C3. In addition to comments and/or reply comments from Heart of Citrus, Highlands Media Company, Inc., Roper Broadcasting, Inc., WGUL-FM, Inc., White Construction Company, and Pasco Pinellas Broadcasting Company, we received two counterproposals proposing upgrades at four communities. The first counterproposal was filed jointly by Sarasota-FM, Inc., licensee of Station WSRZ, Channel 292A, Sarasota, Florida, and Gator Broadcasting Corporation, licensee of Station WRRX, Channel 249A, Micanopy, Florida. That counterproposal proposed an alternate Channel 292C3 upgrade at Beverly Hills in order to accommodate a Channel 246C2 upgrade for Station WLWU, Channel 292A, Holiday, Florida, and a Channel 300A substitution for Station WLOH, Channel 247A, Chiefland, Florida. In turn, these channel substitutions permitted the proposed Channel 293C2 upgrade for Station WSRZ, Channel 292A, Sarasota, Florida, and a Channel 247C2 upgrade for Station WRRX, Channel 249A, Micanopy, Florida. The second counterproposal was filed by Heart of Citrus proposing a Channel 246C2 upgrade for Station WXOF. The *Report and Order* upgraded Station WRRX, Micanopy, to Channel 247C2; Station WSRZ, Sarasota, to Channel 293C2; Station WLWU, Holiday, to Channel 246C2; and Station WXOF, Beverly Hills, to Channel 292C3.¹ The Dickerson Petition for Reconsideration is directed against the Channel 292C3 upgrade at Beverly Hills.²

3. In support of its Petition for Reconsideration, Dickerson argues that the Channel 292C3 allotment at Beverly Hills was made without notice, and that the allotment poses an impediment to its efforts to increase the operating power of Station WEAG-FM to 6 kilowatts.³ Moreover, Dickerson contends that there was no basis to apply the spacing requirements of Section 73.213(c)(1) of the Rules with respect to the Channel 292C3 allotment because only the Channel 246C3 proposal was filed prior to October 2, 1989.⁴ We will consider these arguments *seriatim*.

4. The first argument advanced by Dickerson alleging a lack of notice with respect to a Channel 292C3 allotment at Beverly Hills is not well taken for two reasons. First, as noted earlier, the *Notice* did, in fact, propose a Channel

¹ In order to accommodate the Channel 247C2 upgrade for Station WRRX at Micanopy, the *Report and Order* also substituted Channel 300A for Channel 247A at Chiefland, Florida, and modified the construction permit of Station WLOH to specify operation on Channel 300A. In addition, the *Report and Order* granted the Channel 292C3 upgrade for Station WXOF at Beverly Hills in conjunction with the Channel 246C2 upgrade for Station WLWU at Holiday. These proposals were an "in-compatible channel swap" as envisioned in *Modification of FM Broadcast Licenses to Higher Class Co-Channel or Adjacent Channel*, 60 RR2d 114,120 (1986). See *Holiday, Florida*, 7 FCC Rcd 2557 (1992); see also *Clincho, Virginia*, 6 FCC Rcd 3732 (1991). As such, these nonadjacent upgrades were granted without opening either proposed upgrade to other expressions of interest.

² The Channel 292C3 allotment at Beverly Hills does not meet the 142-kilometer separation requirement now set forth in Section 73.207 of the Rules with respect to Station WEAG-FM. However, we specifically stated in the *Report and Order* that because the petition for rule making proposing the Class C3

upgrade for Station WXOF was filed prior to the October 2, 1989, effective date of the new FM spacing requirements, Heart of Citrus, Inc. may avail itself of the former 138-kilometer FM spacing requirement now set forth in Section 73.213(c)(1) of the Rules in regard to Station WEAG-FM.

³ In this regard, we note that a 6-kilowatt operation for Station WEAG-FM would result in additional service to approximately 28,554 persons, while a Class C3 upgrade for Station WXOF will result in additional service to approximately 99,884 persons.

⁴ In addition to expressing its support for a blanket 6-kilowatt power increase for all Class A FM stations, Dickerson addresses the impact of existing FM allotments at Kingsland, Georgia, Five Points, Florida, Cross City, Florida, and Pointe Vedra Beach, Florida, on its efforts to increase operating power to 6 kilowatts. Neither these allotments nor the issue of a blanket 6-kilowatt power increase was before the Commission in MM Docket No. 92-195. As such, these matters will not be considered in resolving the Dickerson Petition for Reconsideration in this proceeding.

246C3 upgrade for Station WXOF. However, in paragraph 3(c) of the Appendix to the *Notice*, we expressly alerted all potentially interested parties that "the filing of a counter-proposal may lead the Commission to allot a different channel than was requested for any of the communities involved." A summary of the *Notice* was published in the Federal Register on September 15, 1992, 57 FR 42537, thereby affording all interested parties notice of the proposed upgrade. Second, we are not required by either our Rules or the Administrative Procedure Act to issue a separate *Notice* for every channel under consideration. See *Pinewood, South Carolina*, 5 FCC Rcd 7609 (1990); citing *Medford and Grants Pass, Oregon*, 45 RR 2d 359 (1979); *Pensacola, Florida*, 62 RR 2d 535 (1982). The *Notice* elicited counterproposals and announced the possibility of allotting alternate channels to any community in MM Docket No. 92-195. The fact that the *Report and Order* allotted an alternate channel to Beverly Hills which, in turn, precludes any subsequent consideration of a 6-kilowatt operation for Station WEAG-FM, was merely doing that which we announced that we could do. As such, this procedure meets the "logical outgrowth" test applied to determine whether a rule making action is based on adequate notice and opportunity for public participation. See *Weyerhaeuser Company v. Costle*, 590 F.2d 1011,1031 (D.C. Cir. 1978); *Owensboro on the Air v. United States*, 262 F.2d 702 (D.C. Cir. 1958).

5. It is also our view that we correctly applied the former FM spacing requirements now set forth in Section 73.213(c)(1) of the Rules with respect to the Channel 292C3 allotment at Beverly Hills. As stated earlier, Heart of Citrus filed its Petition for Rule Making on September 29, 1989. In accordance with *Amendment of Part 73 of the Rules to Provide for an Additional FM Station Class (Class C3) and to Increase the Maximum Transmitting Power for Class A FM Stations*, 4 FCC Rcd 6375 (1989) ("*Mileage Separation Order*"), the Heart of Citrus Petition for Rule Making, and all other petitions for rule making filed prior to October 2, 1989, were processed pursuant to the rules then in effect. The former FM spacing requirements specified a 138-kilometer separation between a Class A and a Class C3 co-channel FM allotment. Furthermore, the procedure discussed in the preceding paragraph for considering alternate channels was in effect at the time Heart of Citrus filed its Petition for Rule Making and remains in effect. The Heart of Citrus Petition for Rule Making was merely examined and considered in accordance with the rules in effect on the date it was filed. There is nothing in *Mileage Separation Order* that would suggest that we would not follow our procedures with respect to considering alternate channels in a rule making proceeding.

6. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration filed by Dickerson Broadcasting, Inc., IS DENIED.

7. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
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